

APR 09 2009

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6044

DATE COMPLAINT FILED: July 23, 2008

DATE OF NOTIFICATION: July 29, 2008

LAST RESPONSE RECEIVED: September 17, 2008

DATE ACTIVATED: October 14, 2008

EXPIRATION OF SOL: July 15, 2013 to July 28, 2013

COMPLAINANT:

Austin F. Barbour, Campaign Manager, Wicker for Senate

RESPONDENTS:

Ronnie Musgrove for Senate and C. Dale Shearer, in his official capacity as Treasurer Democratic Senatorial Campaign Committee and John B. Poersch, Jr., in his official capacity as Treasurer

RELEVANT STATUTES AND REGULATIONS:

**2 U.S.C. § 434(b)
2 U.S.C. § 441a(a)(7)
2 U.S.C. § 441a(d)
2 U.S.C. § 441a(f)
2 U.S.C. § 441d
11 C.F.R. § 100.22(b)
11 C.F.R. § 109.21
11 C.F.R. § 110.11**

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter involves a television advertisement created and paid for by Democratic Senatorial Campaign Committee and John B. Poersch, Jr., in his official capacity as Treasurer, ("DSCC") featuring respondent Ronnie Musgrove, a candidate in the 2008 Senate race in Mississippi. Complainant Wicker for Senate, the campaign committee of Musgrove's opponent

1 in the General Election, alleges that the advertisement is a coordinated communication, the costs
2 should have been reported as such, and that those costs constitute an excessive contribution. The
3 complaint also alleges that the advertisement violates the "stand by your ad" provision of the
4 disclaimer regulations. As more fully set forth below, we recommend that the Commission find
5 no reason to believe that the DSCC violated 2 U.S.C. § 441a(d) of the Federal Election
6 Campaign Act of 1971, as amended ("the Act") by making an excessive coordinated party
7 expenditure in the form of a coordinated communication, or that Ronnie Musgrove for Senate
8 and C. Dale Shearer, in his official capacity as Treasurer, ("Musgrove Committee") violated
9 2 U.S.C. § 441a(f) by accepting an excessive contribution in the form of a coordinated
10 communication. The advertisement fails to meet any of the content standards set forth in
11 11 C.F.R. § 109.37(a)(2) and, therefore, does not constitute a coordinated communication.
12 Consequently, we also recommend that the Commission find no reason to believe that the DSCC
13 or the Musgrove Committee violated 2 U.S.C. § 434(b) by failing to report the costs of the
14 advertisement. Finally, we recommend that the Commission find reason to believe that the
15 DSCC violated 2 U.S.C § 441d by failing to include the proper disclaimer on the advertisement
16 because the available information suggests that the Musgrove Committee may have authorized it.

17 **II. FACTUAL AND LEGAL ANALYSIS**

18 **A. Facts**

19 On July 9, 2008, the DSCC created a 30-second television advertisement featuring
20 candidate Ronnie Musgrove, who participated in the filming.¹ The advertisement was filmed in
21 a county office building and public square in Canton, Mississippi. According to complainant
22 Wicker for Senate and campaign manager Austin Barbour ("Wicker"), the DSCC bought

¹ The advertisement may be viewed at <http://www.youtube.com/watch?v=QFocGGWXgzA&NR=1>.

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1 statewide airtime for the advertisement to run from July 15 through July 28, 2008, costing
2 approximately \$240,214 per week.

3 The advertisement is as follows:

4 **AUDIO**

5
6 The issue: Spending is out of control
7 in Washington. We can fix it with
8 Mississippi common sense.

9
10 As governor, Ronnie Musgrove balanced
11 budgets by cutting \$200 million in waste.
12 Took on his own party, vetoing 45 spending
13 bills. In four years as governor, no new taxes.

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21 Fiscal common sense. It works in
22 Mississippi. It can work in Washington. Call
23 Congress and tell them to cut wasteful
24 spending and start balancing the budget.

VISUAL

"THE ISSUE: SPENDING OUT OF
CONTROL IN WASHINGTON"
(picture of U.S. Capitol.)

(Banner) "Former Gov. Ronnie Musgrove"
(RM speaking to a group, big
chart) (newspaper headline
"Musgrove's Budget Tightens
State's Belt")
(RM talking to people)
(newspaper headline "Musgrove
orders big cuts")
(RM continues talking to people)
(Caption) "No New Taxes"

(RM talking to people, studying a
document.) (picture of U.S. Capitol)
"CALL CONGRESS (202) 224-
3121. Tell Congress to Control
Wasteful Spending."

25
26
27 The advertisement contains a written and an oral disclaimer at the end stating that the
28 DSCC paid for the ad and is responsible for its content, and that it was not authorized by any
29 candidate or candidate's committee. The DSSC did not disclose the costs of the advertisement
30 as a coordinated party expenditure, an independent expenditure, or as an in-kind contribution in
31 its FEC reports.

32 Wicker alleges that the advertisement constitutes an excessive contribution in the form of
33 a coordinated communication because it "republishes" campaign material that must have been
34 prepared with Musgrove's "cooperation and coordination." Wicker also alleges that the
35 advertisement expressly advocates Musgrove's election. Wicker states that the DSCC exceeded

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1 its party committee coordinated spending limit in Mississippi, which was \$180,800, because the
2 cost of the advertisement in airtime alone was at least \$240,214 per week. Finally, the complaint
3 alleges that the DSCC and the Musgrove Committee committed reporting and disclaimer
4 violations in connection with the advertisement. According to the complaint, the advertisement
5 should have included a disclaimer that Musgrove approved the advertisement pursuant to the
6 "stand by your ad" provisions.

7 The Musgrove Committee and the DSCC (collectively "respondents") reply that the
8 advertisement does not meet the content prong of the Commission's coordination regulation and,
9 therefore, does not constitute a coordinated communication. They state that the advertisement
10 does not republish campaign material because the footage of the candidate, as well as the
11 advertisement, was created by the DSCC. The DSCC also states that it paid for the production
12 and dissemination of the advertisement. Respondents further argue that the advertisement is an
13 issue ad that does not contain express advocacy. Respondents did not address the allegations
14 regarding the reporting and disclaimer violations.²

15 **B. Party Coordination Analysis**

16 Under the Act, an expenditure made by any person "in cooperation, consultation, or
17 concert, with, or at the request or suggestion of, a candidate, his authorized political committees
18 or their agents" constitutes an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i). A political
19 party communication is coordinated with a candidate, a candidate's authorized committee, or
20 agent of the candidate or committee when the communication satisfies the three-pronged test set
21 forth in 11 C.F.R. § 109.37: (1) the communication is paid for by a political party committee or

² We sent the respondents a pre-RTB letter to give them a second opportunity to address the disclaimer allegation, but they did not respond.

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1 its agent; (2) the communication satisfies at least one of the content standards set forth in
2 11 C.F.R. § 109.37(a)(2); and (3) the communication satisfies at least one of the conduct
3 standards set forth in 11 C.F.R. § 109.21(d). The payment by a political party committee for a
4 communication that is coordinated with a candidate must be treated by the political party
5 committee making the payment as either an in-kind contribution to the candidate with whom it
6 was coordinated or a coordinated party expenditure. 11 C.F.R. § 109.37(b). The costs of a
7 coordinated communication must not exceed a political committee's applicable contribution or
8 expenditure limits set forth in the Act; specifically, the DSCC could not contribute more than
9 \$5,000 to, or make over \$180,800 in coordinated party expenditures on behalf of, the Musgrove
10 Committee. See 2 U.S.C. §§ 441a(a)(2)(A), 441a(d)(3)(A). In addition, the Musgrove
11 Committee could not knowingly accept an excessive contribution. See 2 U.S.C. § 441a(f).

12 There is no dispute that the payment and conduct prongs of the coordination regulation
13 are satisfied in that someone other than the candidate – the DSCC – paid for the advertisement
14 and the candidate was materially involved in the content of the communication by appearing in
15 it. Complainant and respondents disagree over the content prong, which, in relevant part, is
16 satisfied if there is a public communication that “disseminates, distributes, or republishes, in
17 whole or in part, campaign materials prepared by a candidate, the candidate’s authorized
18 committee or an agent of any of the foregoing” or that “expressly advocates the election or
19 defeat of a clearly identified candidate for Federal office.” 11 C.F.R. § 109.37(a)(2)(i) and (ii).³

³ Subpart iii of the content prong of the coordinated communication regulation is not applicable here because the DSCC advertisement aired more than 90 days before the general election. See 11 C.F.R. § 109.37(a)(2)(iii).

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1. Republication

The complaint's basis for alleging that respondents republished campaign material is Musgrove's appearance in the advertisement. The complaint states that Musgrove's active participation in the filming of the advertisement with the DSCC constitutes coordination in the form of republication of campaign materials. See Complaint at 1- 2.

Respondents argue that they did not republish campaign material because the advertisement consisted of all new script and footage created by the DSCC, not the Musgrove Committee. They argue that "republishing of campaign materials" as required by the regulation covers existing campaign material emanating from the campaign and that Musgrove's appearance in the advertisement does not convert it to campaign material.

The content prong of the coordinated communication regulation is satisfied by a "public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing." 11 C.F.R. § 109.37(a)(2)(i). Because the material at issue in this matter was produced and disseminated by the DSCC, the DSCC did not republish campaign material.⁴ Therefore, there is no basis to find reason to believe based on the dissemination, distribution or republication standard of the content prong.

⁴ Every MUR that has included an analysis involving republication has involved pre-existing material belonging to or emanating from the campaign. See, e.g., MUR 5743 (Betty Sutton for Congress) (photograph obtained from campaign); MUR 5672 (Save American Jobs Assoc.) (video broadcast on association's website was originally produced and used by candidate's campaign).

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2. Express Advocacy

The complaint also argues that the advertisement expressly advocates Musgrove's election and, thus, satisfies the express advocacy standard of the content prong. See 11 C.F.R. § 109.37(a)(2)(ii). The complaint's basis for this allegation is "the advertisement's very contents, and specifically by Musgrove's own role in the ad." Respondents claim that the advertisement is an issue ad about balanced budgets and wasteful spending and does not contain words such as "vote for," "elect," "vote against," or "defeat" any candidate. According to respondents, the sole call to action in the advertisement asks viewers to telephone Congress, and the advertisement provides a phone number for doing so.

Under the Commission's regulations, a communication contains express advocacy when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" See 11 C.F.R. § 100.22(a); see also *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 ("[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature."). Courts have held that "express advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate." *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley v. Valeo*, 424 U.S. 1, 44, n.52, included the word "support," in addition to "vote for" or "elect," on its list of examples of express advocacy communication).

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1 The Commission's regulations further provide that express advocacy includes
2 communications containing an "electoral portion" that is "unmistakable, unambiguous, and
3 suggestive of only one meaning" and about which "reasonable minds could not differ as to
4 whether it encourages actions to elect or defeat" a candidate when taken as a whole and with
5 limited reference to external events, such as the proximity to the election. *See* 11 C.F.R.
6 § 100.22(b). In its discussion of then-newly promulgated section 100.22, the Commission stated
7 that "communications discussing or commenting on a candidate's character, qualifications or
8 accomplishments are considered express advocacy under new section 100.22(b) if, in context,
9 they have no other reasonable meaning than to encourage actions to elect or defeat the candidate
10 in question." *See* Explanation and Justification for Express Advocacy, *et al.*, 60 Fed. Reg.
11 35292, 35295 (July 6, 1995).

12 As argued by respondents, the advertisement does not contain language that qualifies as
13 express advocacy under 11 C.F.R. § 100.22(a). Further, although we believe the DSCC
14 advertisement is a close call, it does not appear to qualify as express advocacy under 11 C.F.R.
15 § 100.22(b). Even though the advertisement touts Musgrove's qualifications and
16 accomplishments as Mississippi's former governor regarding his fiscal policies and does not ask
17 Musgrove to take or keep a position on an issue, the advertisement can be seen as highlighting
18 Musgrove's actions as examples for current legislators to follow in that the advertisement
19 concludes by asking viewers to "call Congress" and "tell them to start balancing the budget."
20 Taken as a whole, it appears that reasonable minds could differ as to whether the advertisement
21 encourages actions to elect Musgrove.

22 In sum, the DSCC advertisement does not constitute a coordinated communication
23 because it does not disseminate, distribute or republish campaign material prepared by a

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1 candidate and, although a close call, it does not expressly advocate Musgrove's election.
2 Therefore, we recommend that the Commission find no reason to believe the DSCC violated
3 2 U.S.C. § 441a(d) or the Musgrove Committee violated 2 U.S.C. § 441a(f).

4 **C. Reporting Violation**

5 The complaint alleges that the respondents failed to disclose "such coordination or
6 contribution(s)." Based on our recommendation that the advertisement is not a coordinated party
7 expenditure by the DSCC or an in-kind contribution to Musgrove, it does not appear that the
8 respondents committed reporting violations. Therefore, we recommend that the Commission
9 find no reason to believe the DSCC or the Musgrove Committee violated 2 U.S.C. § 434(b).

10 **D. Disclaimer Violation and Investigation**

11 Although we conclude above that the DSCC advertisement does not constitute a
12 coordinated communication, Musgrove's appearance in the advertisement raises the issue of
13 whether he authorized the advertisement. Section 441d(a)(2) of the Act provides, "Whenever a
14 political committee makes a disbursement for the purpose of financing any communication
15 through any broadcasting station ... such communication - if paid for by other persons but
16 authorized by a candidate, an authorized political committee of a candidate, or its agents, shall
17 clearly state that the communication is paid for by such other persons and authorized by such
18 authorized political committee." In addition, "Any [such] communication which is transmitted
19 through television shall include, in addition to the [above] requirements ... a statement that
20 identifies the candidate and states that the candidate has approved the communication." See
21 2 U.S.C. § 441d(d)(1)(B). As stated above, the DSCC makes a written and an oral disclaimer at
22 the end of the advertisement stating that it paid for the ad and is responsible for its content, and
23 that the advertisement was not authorized by any candidate or candidate's committee.

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1 It is undisputed that Musgrove consented to be filmed and willingly participated in the
2 filming of the advertisement, appearing in various locations and poses. Given that the
3 advertisement is almost entirely about Musgrove, and the audio portion of the advertisement
4 provides a significant amount of information about Musgrove and his accomplishments, it is
5 likely that he at least checked the script for factual accuracy before appearing in the
6 advertisement. These facts in combination raise the question of whether Musgrove may have
7 authorized or approved the communication such that it would require a "stand by your ad"
8 disclaimer by him.

9 Actions indicating authorization could include whether Musgrove or his authorized
10 committee reviewed the script prior to filming. Application of a plain meaning of
11 "authorization" would include reviewing scripts in advance and giving approval to the finished
12 product. This conclusion is consistent with the Commission's approach in past advisory
13 opinions. See Advisory Opinion 2004-1 (Kerr for Congress and Bush-Cheney '04) (disclaimer
14 by President Bush would be required in television advertisement featuring Kerr and images of
15 President Bush if agents of the President were to review the final script for legal compliance,
16 factual accuracy, quality, consistency with the President's position, and any content that
17 distracted from or distorted his "endorsement" of the featured House candidate in advance of his
18 appearance in the advertisement); Advisory Opinion 2004-29 (Todd Akin for Congress)
19 (disclaimer required for a candidate appearing in advertisements regarding state ballot initiatives
20 where the candidate retained control over his appearance in the advertisements and submitted his
21 statement to the ballot initiative committee funding the advertisement or reviewed any statement
22 to be attributed to him); cf. Advisory Opinion 2005-18 (Reyes Committee) (disclaimers not
23 required for federal candidates featured as guests on a radio program because the candidates did

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1 not have editorial control over the program, guests, or callers and did not pay for or authorize the
2 communication).

3 The response to the complaint merely states that the script did not come from the
4 Musgrove campaign and that the DSCC hired its own media consultants to draft the script, shoot
5 footage, edit the ad, and place it with television stations. The response does not address whether
6 Musgrove or the Musgrove Committee took any actions that would establish that he approved or
7 authorized the communication and, in this regard, appears to conflate the concepts of
8 coordination and authorization. As mentioned above, we sent a letter to respondents' counsel
9 seeking voluntary clarification regarding Musgrove's possible authorization of the advertisement
10 but have not received a response.

11 If Musgrove or his committee authorized the communication, the advertisement's
12 disclaimer would be in violation of the Act. Thus, more information is needed to determine
13 whether Musgrove or his committee approved or authorized the advertisement to address the
14 allegation that the respondents violated the disclaimer provisions. Therefore, we recommend
15 that the Commission find reason to believe that the DSCC violated 2 U.S.C. § 441d.⁵

⁵ We are not recommending pursuing the Musgrove Committee for the disclaimer violation because it did not pay for the advertisement.

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III. RECOMMENDATIONS

1. Find no reason to believe that Ronnie Musgrove for Senate and C. Dale Shearer, in his official capacity as Treasurer, violated 2 U.S.C. §§ 434(b), 441a(f) and 441d.
2. Find no reason to believe that the Democratic Senatorial Campaign Committee and John B. Poersch, Jr., in his official capacity as Treasurer, violated 2 U.S.C. §§ 434(b) and 441a(d).
3. Find reason to believe that the Democratic Senatorial Campaign Committee and John B. Poersch, Jr., in his official capacity as Treasurer, violated 2 U.S.C. § 441d(a)(2).
4. Approve the attached Factual and Legal Analysis.

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5.

6. Approve the appropriate letters.

April 9, 2009
Date

Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel

Ann Marie Terzaken
Ann Marie Terzaken
Associate General Counsel for Enforcement

Stephen A. Gura
Stephen A. Gura
Deputy Associate General Counsel
for Enforcement

Elena Paoli
Elena Paoli
Attorney

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